Managing Texas Ground Water: More Difficult than Ever?

Mary Kelly September 6, 2013

Managing the use of ground water in Texas has never been easy. But a recent string of cases, now topped off by a stunning Court of Appeals opinion in *Edwards Aquifer Authority v. Bragg*, will make it much more difficult to conserve this vital resource for current and future users and to protect the spring flows that supply rivers.

In fact, if the *Bragg* opinion is not over-turned, clarified or narrowed by the Texas Supreme Court, neither the state or groundwater districts have a clear path forward toward effective conservation and management of ground water. Instead, regulators and ground water users could face years of fact-specific, expensive "takings" litigation that will interfere with and even derail reasonable management approaches.

How did we get here (in a nutshell)?

The "rule of capture," which essentially allowed an overlying landowner to pump as much water as possible, even if draining his neighbor, was recognized as the common law by Texas courts in the 1904 case of *Houston & T.C. Ry. Co. v. East*. Given that the state had a largely rural population of about 3 million at the time, there was no push to put a statewide or regional regulatory approach in place.

In 1917, the state passed the Conservation Amendment to the constitution, providing for the creation of conservation districts and eventually leading to a state ground water management approach that relied on localized groundwater districts. Now, in addition to the regional Edwards Aquifer Authority, and a few other multi county groundwater districts, the state has over 97 groundwater districts. Many of these districts are struggling with limited budgets, volunteer boards, insufficient data on aquifer conditions, and a complicated, exemption-ridden authority statute. Meanwhile, a growing population has cities and water speculators looking anywhere and everywhere for new water supplies, including trying to develop projects for exporting large amounts of rural ground water to urban areas.

Enter the Texas Supreme Court. While the Edwards Aquifer Authority, capably defended by the state of Texas, survived facial takings challenges in 1996 (*Barshop v. Median Cnty Underground Water Conservation District, 925 S.W.2d 618 (Tex. 1996)*), three years later the court reaffirmed the rule of capture as the governing common law in *Sipriano v. Great Spring Waters of America, Inc*, 1 S.W.3d 75 (Tex. 1999). Last year, in *Edwards Aquifer Authority v. Day, 369 S.W.3d 814 (2012)*, the court held that the overlying landowner owned ground water in place, immensely complicating the tasks of ground water districts by eliminating reliance on historic use as the basis for permits. The *Day* decision did provide a window of hope by clearly recognizing the state's power to regulate production of groundwater and that "regulation is essential to its conservation and use."

Some groundwater districts interpreted *Day* to mean that they essentially had to issue permits for some level of pumping to all-comers. If aquifer levels declined too far, production from both existing and new permits could then be reduced. While this might be considered a pretty good deal for new entrants to the aquifer, it could cause uncertainty and economic damage to existing pumpers that relied on permits already issued by the districts. In addition, such an approach means a data-intensive, real-time approach to aquifer management, which few local districts in Texas can afford.

But, the *Day* opinion did not reach the critical issue of when a regulatory action that affected the amount of ground water a landowner could pump is a taking. It did not explain how districts and courts should apply the traditional *Penn Central* regulatory takings test to groundwater district regulations. Thus, most water attorneys were left holding their breath for the next case in the pipe, *Edwards Aquifer Authority v. Bragg*.

Bragg v EAA

The facts and outcome of *Bragg* are discussed here, here and here. This article provides a good overview of some of the other salient aspects of the opinion regarding liability, statute of limitations and the basis for calculating compensation. But, the *Penn Central* analysis in the court of appeals opinion is at the heart of the matter. While each regulatory takings case presents its own unique set of facts (that, of course, is the nature of a takings claim), the balancing test applied in Bragg is deeply troubling.

After some preliminaries about the variety of factors that could be considered in a regulatory takings analysis, the Bragg court essentially focuses its analysis on three *Penn Central* factors: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character and purpose of the governmental action. The court spends approximately nine pages on the first two factors and less than two on the third.

On the first factor, the court concluded that "[d]espite what might amount to only a ten percent increase in their irrigation expense, we do not consider this merely an incidental dimunition in value. The result of the regulation forces the Braggs to purchase or lease what they had prior to the regulation—an unrestricted right to the use of water beneath their land…Thus, we conclude this factor weighs heavily in favor of finding a compensable taking…" (*citations omitted*). While the EAA statute does limit a landowner's pumping, it also protects other landowners sharing the same aquifer. …The ground water source is not unlimited, but the court does not recognize that its decision could adversely affect many other landowners that the regulations were intended to protect. If the conclusion that a ten percent increase in irrigation expense for one landowner is enough to "weigh heavily" in favor of a taking stands as a widely used precedent for future cases, there seems little room for groundwater districts to cut back or deny a permit for irrigation without at least raising the specter of a takings challenge, especially for any property purchased for irrigation before a district was established or before the district enacted the pumping regulations.

The court also found that the second factor weighed heavily in favor of finding a compensable taking. The court essentially concluded that because the Braggs bought the properties before the Edwards Aquifer Act was implemented through regulations, they had "reasonable investment-backed expectations" that they could pump an unrestricted amount of water for their pecan orchards, even though they had no "reasonable investment-backed expectation that there would *never* be a regulatory scheme that might govern their use of water…" Say what?

The "reasonable investment-backed expectations factor" also illustrates the conundrum of how an ownership right in groundwater can possibly be defined for "takings" purposes when the rule of capture still exists. The Braggs may not have faced *regulatory* restrictions before the EAA was in place, but they could have been pumped dry by a nearby well. So, how can the state liable for a regulatory taking when a landowner would have had no remedy for loss of groundwater prior to enactment of the regulatory structure?

If this part of the *Bragg* analysis were to be widely used in future cases, it would mean that anyone who owned property before a district was formed or before its rules were enacted could support their takings claim by claiming their investment was based on the understanding that they had a right to unrestricted pumping. And, it is not at all clear that the investment-backed expectations would be limited to irrigation use of the water. As most districts have been established in just the last 10 to 15 years, there is potentially a big universe of landowners with that fact situation, not a few isolated cases.

Most troubling of all is the short shrift the court gives to the purposes of the Edwards Aquifer Act and the regulations adopted to implement the Act. The court acknowledged that the *Day* court held that ground water production can be regulated, quoted the purpose of the Edwards Aquifer Act, and summarily concluded that "this factor weighs heavily against a finding of compensable taking."

The court made little effort to discuss how the Act actually protects the Braggs and other farmers from the aquifer being drained. It did not explore how the EAA regulations help protect the spring flows that sustain surface water flows (and surface water rights) in the Guadalupe River Basin. It did not discuss how to balance the Braggs' agricultural needs with other needs for the ground water. It did not explore how holding that the EAA regulations constituted a compensable taking in this case could potentially undermine the entire structure and purpose of the Act or the ability of other ground water districts to carry out their statutory mandates.

In essence, the court did not seek to actually *balance* the first two factors against the broad and significant public purposes of the Edwards Aquifer Act. It merely concluded, after noting that the Bragg's business was "heavily dependent on water" that "the record supports the conclusion that the permitting system imposed under the Act resulted in a regulatory taking…"

This level of analysis unfortunately does a disservice to the vital and broad natural resource management, economic and sustainability issues that are presented by the *Bragg* case.

What's next?

Hopefully, the EAA *and* the state will mount a vigorous appeal of the San Antonio Court's opinion. They must bring to the Texas Supreme Court the larger issues that are at stake in this case. Existing ground water permit holders should join in that appeal. They have made investments in reliance on a reasonable regulatory approach in Texas, an approach that is highly threatened by the *Bragg* opinion.

Sixty percent of Texan's water needs are currently supplied by ground water. Even with the regulatory system we have in place now, aquifers are declining in many areas of the state. The state and its booming population cannot afford a decade or more of litigation to sort out what ground water district actions will be secure from a takings challenge and which won't, based on thousands of possible fact combinations. That course of action might be a full employment avenue for lawyers, but it's a recipe for serious economic and environmental trouble.

groundwater Texas water

Leave a Reply

Your email address will not be published. Required fields are marked *

Name *

Email *

Website

Comment

POST COMMENT

The Energy Center blog is a forum for faculty at the University of Texas, leading practitioners, lawmakers and other experts to contribute to the discussion of vital law and policy debates in the areas of energy, environmental law, and international arbitration. Blog posts reflect the opinions of the authors and not of the University of Texas or the Center for Global Energy, International Arbitration and Environmental Law.

Popular Tags

Texas
water
drought
energy
fracking
endangered species
natural gas
groundwater
court cases
conservation
pollution
TCEQ
LNG
regulation
climate change